



EMPLOYMENT TRIBUNALS

Claimant: Mr Daniel Holloway

Respondent: Crawley Borough Council

RECORD OF A PRELIMINARY HEARING

Heard at: by CVP at Croydon

On: 12 May 2023

Before: Employment Judge Sekhon

Appearances

For the claimant: Mr Jason Bray, lay representative, with Mr Holland

For the respondent: Mr Bellm, Solicitor, DMH Stallard

RESERVED JUDGMENT

1. The Claimant was not a disabled person within the meaning of section 6 of the Equality Act 2010 at the material times and the claim of discrimination arising from disability and failure to make reasonable adjustments is struck out.

REASONS

Introduction

1. The matter was listed before me as a preliminary hearing to determine whether the claimant was at all relevant times a disabled person under Section 6 of the Equality Act 2010 by reason of anxiety and depression.

Background

2. A case management hearing took place on 9 November 2022 before Employment Judge Beck and the Order sets out the following useful summary of the claim which the parties agreed was accurate: -

“The claimant was employed by the respondent, a Local Authority, as a Parking Services Manager, from 1 April 2015 until 1 March 2021. Early conciliation started on 25 May 2021 and ended on 6 July 2021. The claim form was presented on 14 July 2021.”

The claim is about unfair dismissal, discrimination arising from disability- section 15, and failure to make reasonable adjustments sections 20/21. The claimant states at the material time and to date he suffers from anxiety and depression. The claimant was signed off work for the period 30 March 2020 to 8 June 2020. He returned to work on a phased basis, and states he was asked to cut his phased return short and work full time. The claimant had previously paid for his parking at work until the 23 June 2020, when he cancelled his permit. On 26 October 2020 the claimant attended a meeting, and it was alleged he had parked on 14 of 37 occasions without paying for his parking. The claimant attended a disciplinary hearing on the 1 March 2021 and was dismissed in relation to the parking matters. An appeal on the 12 May 2021 upheld the original decision. The claimant alleges he was treated unfavourably for forgetting to pay for his parking tickets, forgetfulness being a consequence of his anxiety and depression. Also, that the respondent failed to make reasonable adjustments, and dismissed him for a reason relating to his disability.

The respondent's defence is that the claimant's dismissal was for misconduct. It disputed that the claimant was asked to cut short his phased return to work. He accepted in his disciplinary meeting not paying the 14 parking tickets, this was found to be an abuse of his position as Parking Services Manager. He was also found to fail in his judgment when he allowed his team not to enforce parking tickets in the Council's multi storey car park. The respondent says it undertook a reasonable investigation. It is denied the respondent failed to take into account the claimant's health or that it discriminated on the grounds of disability."

3. Employment Judge Beck prepared a List of Issues for a Final Merits hearing which has been listed to take place on 12-15 September 2023 for 4 days.
4. Paragraph 1 of the List of Issues is as follows and is to be determined at the hearing today:-
 - "1. Does the Claimant's disabilities of anxiety and depression meet the definition of disability for the purposes of section 6 and schedule 1 of the Equality Act 2010 in that:
 - (a) They have a mental or physical impairment that has lasted or was expected to last for 12 months or more; and
 - (b) The impairments have a substantial impact of the claimant's ability to carry out their day-to-day activities."
5. After a discussion with the parties, the relevant times that unfavourable treatment occurred for the purposes of the discrimination claim were agreed as: -
 - (a) **8 June 2020**, the date the claimant's phased return to work commenced.
 - (b) **1 September 2020 and 13 October 2020**, the dates that the claimant failed to pay for parking.
 - (c) **26 October 2020**, the date that the respondent informed the claimant about the failure to pay parking charges.
 - (d) **1 March 2021**, the date of the claimant's dismissal.
6. In addition, the respondent submitted as set out in their skeleton argument that they intended to rely on section 4(1)(b) of the Equality Act (Disability) Regulations 2010, which excludes a tendency to steal from amounting to an impairment for the purposes of defining disability. It was agreed with the parties that the Tribunal would consider this submission when reviewing the evidence.

The Hearing

7. The respondent provided a bundle totalling 304 pages in advance of the hearing and references in square brackets in this Judgment are to pages in that bundle. The respondent served a witness statement from Mr Nigel Sheehan, Principal Leisure Officer for the respondent and the claimant's manager. Shortly before the hearing commenced, I received a skeleton argument from the respondent together with supporting case law.
8. The claimant did not serve a witness statement for the hearing but provided an impact statement dated 9 January 2023. I read the witness statements and heard evidence from the claimant and Mr Sheehan under oath.
9. At the outset of the hearing, I discussed with the parties whether any reasonable adjustments were required for the hearing. Mr Holloway confirmed that he may need breaks during the hearing, and we agreed that he could take a break at anytime by raising his hand.
10. The claimant attended without legal representation, but his friend Mr Bray represented him during the hearing and Mr Bellm, solicitor, attended on behalf of the respondent.
11. The Hearing was listed for a day. After hearing the evidence and submissions, I reserved my decision due to time constraints.

The Law

12. For the purposes of section 6 of the Equality Act 2010 a person is said to have a disability if they meet the following definition:

“(1) A person (P) has a disability if-
 (a) P has a physical or mental impairment, and
 (b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities.”
13. The burden of proof lies with the claimant to prove, on the balance of probabilities, that he is a disabled person in accordance with the definition above (*Morgan v Staffordshire University* [2002] IRLR 190).
14. Paragraph 12 of Schedule 1 provides that a Tribunal must take into account such guidance as it thinks is relevant in determining whether a person is disabled. Such guidance which is relevant is that which is produced by the government's office for disability issues entitled “Guidance on matters to be taken into Account in Determining Questions Relating to the Definition of Disability” The guidance should not be taken too literally and used as a check list (see *Leonard v Southern Derbyshire Chamber of Commerce* (2001) IRLR 19).
15. *Goodwin v Patent Office* [1999] ICR 302 provides there are four limbs to the definition in section 6(1) of the Equality Act 2010:
 1. Does the person have a physical or mental impairment?
 2. Does that impairment have an adverse effect on their ability to carry out normal day to day activities?
 3. Is that effect substantial?
 4. Is that effect long term?
16. The term “substantial” is defined at section 212(1) of the Equality Act 2010 as “more than minor or trivial”. Normal day to day activities are things people do on a regular basis including shopping, reading and writing, having a conversation, getting washed and dressed preparing and eating food, carrying out household tasks, walking and travelling by various

forms of transport, socialising and can include general work (see D2 to D9 of the Guidance on Matters to be Taken into Account in Determining Questions Relating to the Definition of Disability (2011)). The EAT in *Paterson v Commissioner of Police of the Metropolis* [2007] IRLR 763 concluded that 'normal day-to-day activities' must be interpreted as including activities relevant to a professional life.

17. Further clarity is provided at Schedule 1 which explains at paragraph 2(1):
 - (1) The effect of an impairment is long term if –
 - (a) it has lasted for at least 12 months,
 - (b) it is likely to last for at least 12 months, or
 - (c) it is likely to last for the rest of the life of the person affected.
 - (2) If an impairment ceases to have a substantial adverse effect on a person's ability to carry out normal day to day activities, it is to be treated as continuing to have that effect if that effect is likely to recur."
18. For current impairments that have not lasted 12 months, the tribunal will have to decide whether the substantial adverse effects of the condition are likely to last for at least 12 months. The Guidance stipulates that an event is likely to happen if it 'could well happen' (Para C3). The word 'likely' in the Equality Act 2010 simply means something that is a real possibility, in the sense that it 'could well happen', rather than something that is probable or 'more likely than not'.
19. It is important to note that the issue of how long an impairment is likely to last should be determined at the date of the alleged discriminatory act and not the date of the tribunal hearing (*McDougall v Richmond Adult Community College* 2008 ICR 431, CA). It is not permissible to have regard to subsequent events when considering the likely to last 12 months question. The Guidance stresses that anything that occurs after the date of the discriminatory act will not be relevant (Para C4). It also states that account should be taken of both the typical length of such an effect on an individual and any relevant factors specific to this individual, such as general state of health and age.
20. Paragraph 5, Schedule 1 Part 1 of the Equality Act provides that an impairment is treated as having a substantial adverse effect on the ability of the person to carry out normal day to day activities if measures, including medical treatment, are being taken to treat or correct it and, but for that, it would likely to be the effect. In this context, likely is interpreted as meaning 'could well happen' (*SCA Packaging Limited v Boyle* (2009) ICR 1056)). The practical effect is that the impairment should be treated as having the effect that it would have without the treatment in question (B12 Guidance).
21. For the purposes of section 6(1)(a) the claimant relies on the mental impairment of depression and anxiety. In the case of *Nissa v Waverly Education Foundation Limited* UKEAT/0135/18 a warning was given not to concentrate solely on a diagnosis which will be relevant but not determinative. HHJ Eady stated, "*the correct question was to consider what the effects of the impairments were at the material time and to consider whether there was information before the ET which showed that viewed at that time it could well happen that the effects of the impairments would last for more than 12 months.*"
22. In coming to this Judgment, I have regard to the Employment Appeal Tribunal's decision in *J v DLA Piper UK LLP* UKEAT0263/09/RN in which Underhill J, as he then was, drew a distinction between the symptoms of low mood and anxiety caused by clinical depression, which was a situation likely to meet the definition of disability, and those derived from a reaction to adverse circumstances such as problems at work, or adverse life events, which was not.

23. The Employment Appeal Tribunal in the J v DLA Piper case acknowledged there is a line between those two states of affairs which might be blurred, but Underhill J gave guidance as follows:

“We accept that it may be a difficult distinction to apply in a particular case and the difficulty can be exacerbated by the looseness with which some medical professionals and some lay people use such terms as depression, clinical or otherwise, anxiety and stress. Fortunately, however, we would not expect those difficulties often to cause a real problem in context of a claim under the Act. This is because of the long-term effect requirement. If as we recommend at paragraph 42 above, the Tribunal starts by considering the adverse effects issue and finds that the Claimant’s ability to carry out normal day to day activities has been substantially impaired by symptoms characteristic of depression for 12 months or more, it would in most cases be likely to conclude that he or she was indeed suffering clinical depression, rather than simply a reaction to adverse circumstances. It is a common-sense observation that such reactions are not normally long lived.”

24. The respondent’s representative also referred me to a number of cases in his written submissions to which I have had regard.

Finding of fact

25. From the evidence I received and heard, I made the following Findings of Fact, on the balance of probabilities.
26. From 1 April 2015 until his dismissal on 1 March 2021, the claimant worked as a Parking Services Manager. The respondent is a Local Authority. The claimant had responsibility for all the respondent’s parking services, including the payment of parking charges and parking enforcement around the town of Crawley and in car parks and this included the Town Hall car park.

Up to March 2020

27. The claimant started suffering issues with his mental health from 2009. He was referred by his GP to Mid Sussex Counselling services in August 2009 and was diagnosed with mixed anxiety and depressive disorder on 2 June 2010 by his GP. At the consultation on 2 June 2010, the claimant reported feeling low for 5 months, getting panic attacks and that he had had broken up with his girlfriend three weeks previously. He was prescribed 28 tablets of 20mg Citalopram on 2 June 2020 and was advised by his GP to take one a day. The Tribunal accept the claimant’s evidence that the claimant’s symptoms in 2010 were triggered by life events at the time. The Tribunal find the claimant’s symptoms resolved by the end of July 2010.
28. The Tribunal has not been supplied with any GP records between June 2010 and March 2020 that show that the claimant attended his GP during this period complaining of any mental health issues relating to anxiety and depression. The claimant accepted that this was correct and that he did not receive any further medication for his mental health issues between 2 June 2010 and 30 March 2020.

30 March 2020- 7 June 2020

29. The Tribunal find that the claimant started experiencing symptoms of feeling low and anxious in mid-March 2020 and these were triggered by his grandfather’s deteriorating health and the breakdown of his relationship. This was evidenced in the text that the claimant sent his manager Mr Sheehan on 29 March 2020 [66] in which he described that

he was physically unable to cope and stated, *"I've found everything quite overwhelming which is scary as I've never felt like this before"* and the clinical notes of the discussion he had with his GP, Dr Bailey on 30 March 2020 [258], when he reported a few weeks of increasing anxiety and poor concentration and reduced motivation.

30. Dr Bailey signed the claimant off work until 19 April 2020 for mixed anxiety and depression disorder and prescribed 28 Tablets of 40 mg of Propranolol to take one 1 -2 times a day. He also sent him a leaflet about Time to Talk counselling service. After this initial prescription of Propranolol, no further medication was prescribed until 27 October 2020.
31. On 3 April 2020, [71] the claimant emailed Mr Sheehan stating that, *"I am up and down a bit at the moment, sleep seems to be the hardest thing. Medication the doctor gave me doesn't seem to be doing much but I'll talk to them again next week"*.
32. The claimant saw Dr Bailey on 14 April 2020 [258] and reported that did not feel able to go to work due to ongoing challenges at home with his grandfather's illness. Dr Bailey signed the claimant off work until 11 May 2020 for anxiety and depression. Sadly, the claimant's grandfather sadly passed away on 18 April 2020.
33. On 5 May 2020, the claimant spoke to Dr Bailey, and they discussed his grief reaction to his grandfather's death as they were very close. He reported that he did not find Propranolol or Diazepam helpful, and he was offered support via Time to Talk or private counselling through his work. The claimant agreed another month off work would be good and thereafter a phased return would be helpful.
34. Although the Tribunal have not seen any notes of private counselling sessions from Time to Talk and have been provided no details of the dates that such counselling took place, the Tribunal accept the claimant's evidence that he attended counselling in May 2020 as the claimant emailed Mr Sheehan on 7 May 2020 [75] explaining that he was having counselling which he hoped would help and on 3 June 2020 the claimant spoke to Dr Bailey and reported that things were starting to settle down after he had accessed counselling.
35. On 3 June, the claimant reported to Dr Bailey that returning to normality would help him and Dr Bailey provided him with a sickness certificate dated 8 June 2020 stating that the claimant was fit to return to work on a phased return with altered hours and setting out a time from 8 June 2020 to 2 August 2020 for this to take place.

8 June 2020 – 26 October 2020

36. On 3 June 2020 [78], the claimant emailed Mr Sheehan stating that his GP had advised a phased return to work initially working 2 days a week and building this up to normal hours. Mr Sheehan emailed Joe Mottershead, HR consultant, with the claimant's sickness certificate who advised by email on 8 June 2020 [81] that he meet with the claimant at the end of every week to discuss how he was and the possibility for him increasing his hours. She also advised that a phased return should last no more than 4 weeks.
37. The claimant returned to work on 8 June 2020 and had a meeting with Mr Sheehan that afternoon to discuss working arrangements and his phased return. No contemporaneous notes of this meeting have been provided to the Tribunal.
38. Following a discussion on 12 June 2020, Mr Sheehan and the claimant signed a document on 15 June 2020 [83] called, "Employee Certificate and Return to Work form" and this set out the reason for the claimant's absence between 30 March 2020 to 8 June 2020 was for anxiety / stress and depression and that this absence was not considered to be related to a disability. In the comments section this stated,

“Dan will work on a phased return to work. It is anticipated this will be over the next four weeks. I will liaise with Dan on a weekly basis to discuss how he is managing with his return to work and increase in hours. Dan did not indicate he needs any further support at this point however we will keep this under review in the coming weeks.”

39. In the period of phased return to work for 4 weeks from 8 June 2020 the claimant had weekly meetings with Mr Sheehan. The claimant did not seek any assistance from Mr Sheehan to support him with tasks or his workload or seek any reasonable adjustments because of any symptoms that he was suffering due to anxiety / depression. The claimant did not ask Mr Sheehan for the time for his phased return to be extended beyond 4 weeks. On 8 July 2020, the claimant confirmed to Mr Sheehan, *“all good my end”* when he was asked by Mr Sheehan whether he wanted to catch up.
40. There is a dispute between the parties as to whether the claimant was able to perform his work duties adequately due to poor concentration and focus between 8 June 2020 and 26 October 2020. The Tribunal accept the evidence of Mr Sheehan that between 8 June 2020 and 26 October 2020 the claimant did not give Mr Sheehan any cause for concern that he was not able to concentrate or focus whilst performing his work duties and that during this period he carried out tasks that required focus and attention to detail.

27 October 2020

41. On 27 October 2020, the claimant spoke to his GP (Dr Tiziana Camilleri) and reported that he had been dismissed from work the previous day as on occasions he had forgotten to pay for parking as he was having problems with poor concentration and memory due to his anxiety and depression. Dr Camilleri prescribed 28 tablets of 40 mg of Propranolol and advised him to take one 1 -2 times a day.
42. The claimant spoke to his GP (Dr Khan) on 2 November 2020 [261] reporting more anxiety and asking that the letter Dr Camilleri wrote be changed to *“add a line, that he is more forgetful and its due to depression/ anxiety/ stress so that they would accept it and reinstate him.”* Dr Khan recorded that she can't change the letter and would ask Dr Camilleri to review this and would update him. This letter was amended by Dr Camilleri at per the claimant's request of 2 November 2020. The letter is addressed to whom it may concern, dated 27 October 2020, and reads,

*“This is to confirm that Mr Holloway has been having regular consultations with the surgery with regards to managing symptoms of anxiety, depression and grief. **There has been documentation in the notes with regards to his poor ability to concentrate and forgetfulness due to depression and anxiety and too much stress. As a result he was in fact signed off work for a matter of months since the 30 March 2020.”** (Tribunal emphasis added)*

43. The Tribunal find that this letter refers to documentation in the notes regarding poor concentration and forgetfulness. The Tribunal find that there is only one previous reference in the clinical notes of poor concentration on 30 March 2020 and there is no previous reference of forgetfulness in the clinical notes. The Tribunal do not accept this letter as an accurate representation of the clinical notes and find that this letter was amended to include the term forgetful at the claimant's request on 2 November 2020.
44. The claimant spoke to his GP (Dr Maunick) on 30 October 2020 reporting difficulties sleeping due to ongoing stress at work. He was prescribed 14 tablets of Zopiclone (3.75 mg) to take one at night to help with his sleep. This was increased to 7.5 mg on 11 November 2020 when he was given a further 7 Tablets. He was then prescribed 7.5 mg of Zopiclone on 2 December 2020 and advised to take one table every third night.

45. The claimant was signed off work by his GP on 2 November 2020 to 15 November 2020 for anxiety and depression and this stated that he found it “difficult to concentrate at work, await counselling therapy”. The sickness certificate was extended on 16 November 2020 until 13 December 2020 [134]. This certificate dated 16 November 2020 does not refer to any issues relating to concentration that the claimant was experiencing.
46. On 3 November 2020, the claimant was prescribed 28 tablets of Citalopram (20mg) to take daily and this prescription was repeated on 8 December 2020, 29 December 2020, and 8 February 2021. His prescription of Citalopram was increased to 30 mg on 10 March 2021 and to 40 mg on 9 April 2021 and he was prescribed this does monthly or thereabouts until 28 November 2022 [299/300].
47. The claimant spoke to his GP (Dr Farant) on 11 November 2020 [262] and reported that he had not taken his medication or self-referred to Time to Talk as he was worried about ongoing suspension from work. He agreed to do so after a long discussion and was sent the link for counselling.
48. The claimant spoke to his GP (Dr Hardingham) on 16 November 2020 [263] and he was noted to be “struggling to sleep and struggling to do anything” and he reported “motivation and concentration are a problem”.
49. The claimant spoke to Mr Greg Clement, (Advanced Paramedic Practitioner) on 2 December 2020 reporting insomnia and weight loss of 6 kg. He asked for a GP letter setting out what this should include, namely that 4 days to complete the questions from his employer was not enough, that a 2-week extension was required as a reasonable adjustment and, he was not well enough to deal with the process. Mr Clement wrote a letter to whom it may concern on 2 December 2020 [150] including the details the claimant sought and asked him to check that he had covered everything that he had requested and advised the claimant he would be charged for this.
50. The claimant spoke to his GP (Dr Bailey) on 8 December 2020 [264] who referred him to the Community Mental Health Team on 9 December 2020. An extract of this letter states: -

“Triggers: grandfather died earlier in the year, end of relationship with partner, forgot to re-new parking permit at work - works as parking service manager - he is being investigated for gross misconduct. He is currently signed off work. Has had to get an employment solicitor. Has really increased stress.”
51. The claimant was signed off work by his GP on 8 December 2020 to 7 January 2021 for anxiety and depression.
52. On 18 December 2020, the Mid Sussex Assessment and Treatment Team wrote to the claimant’s GP following his assessment on the phone. The letter states that the claimant has suffered from low mood and anxiety since the beginning of the year and that his mental state deteriorated in October due to work related stress. It noted his motivation and concentration is low.
53. The claimant spoke to his GP (Dr Bailey) on 29 December 2020 [264] when he reported that things felt stable, there was no news from his work situation and the plan was to continue to take Citalopram 20 mg and the Mental Health team had contacted him and was due to speak to them the following week.
54. On 8 February 2021, the claimant spoke to his GP (Dr Camilleri) and reported that things were stable, but his sleep was still poor. The Mental health team had referred him to the

advocacy team to help him. He was advised to continue with Citalopram and to stop taking Zopiclone and take Promethazine Hydrochloride instead.

1 March 2021

55. On 10 March 2021, the claimant saw his GP (Dr John) and reported that he had been dismissed from his job despite mental health problems and he was appealing this. He was not sleeping even with medication, and he was really worried about money which was causing anxiety (tightness in his chest) and a low mood, and he was tearful on the phone. The plan was to increase his dose of Citalopram to 30 mg, and he was also prescribed 56 tablets of 40 mg of Propranolol to take one or twice a day.
56. He was seen by his GP (Dr John) on 9 April 2021 and reported still not sleeping until 3-4 a.m. and he was anxious due to forthcoming appeal hearing. He reported feeling hopeless, useless, and overwhelmed and finding simple tasks hard due to lack of concentration. The plan was for Citalopram to be increased to 40 mg, continue using Propranolol and to stop Promethazine and use a short course of Diazepam instead.
57. The claimant saw his GP on 10 May 2021 after he had lost the appeal for his job and was looking for a solicitor for the Tribunal. He reported some improvement but was still not sleeping and felt sedated by Diazepam. This was then stopped.
58. On 15 June 2021, the claimant reported to his GP that his mental health flares up regarding his tribunal, he was having slightly more good days, but his sleep was still disturbed.
59. On 9 July 2021, the claimant told his GP that his sleep has worsened related to stress of the tribunal, and he was fleeing a bit lower with fleeting suicidal thoughts. The claimant remained on Citalopram.
60. The claimant was referred to the Community Mental Health Team on 12 July 2021 as he was experiencing worsening low mood and anxiety with a marked sleep disorder despite being on the maximum dose of Citalopram. He was assessed by the team by telephone on 20 July 2021 when the claimant reported feelings of hopelessness and helplessness with poor motivation and concentration and a poor appetite and sleep. He was offered short term interventions for 10 months. He was discharged from the team on 1 June 2022 to undertake CBT therapy with Time to Talk to commence on 28 June 2022.
61. The claimant was next seen by his GP on 9 May 2022 when his mood was noted to be low and that his sleep was being affected again. The plan was to continue on Citalopram and trial Promethazine again.
62. Following a telephone discussion with his GP (Dr Hardingham) on 23 May 2022 [277], the claimant wrote a letter stating that he had spoken to his solicitor and setting out what he required the GP letter to cover. He offered to draft this letter for the GP and stated, *“essentially the more we can prove that the deterioration and ongoing struggles are attributed to the work situation the more likely they are to settle the case.”*
63. Dr Hardingham wrote a letter on 24 May 2022 [278] to whom it may concern setting out a background to the difficulties that the claimant was having. This letter states,

“In short I can confirm that Daniel had anxiety symptoms prior to the dismissal from work but the GP notes document and ongoing significant anxiety and insomnia following the dismissal which has required regular help and support from mental health services and general practice.”

64. The claimant self-referred to Time to Talk and had an appointment on 24 May 2022.
65. On 27 June 2022, the claimant reported to his GP that he did not sleep well last night and was feeling isolated, trapped, money so tight that he can't go out. His GP waived the fee for the letter to his solicitor.
66. On 10 October 2022, the claimant reported to his GP that he was sleeping slightly better, but he was getting night sweats and on 14 November 2022, he was sleeping better and being referred by Time to Talk to some other psychology services. The medical records cease on 9 December 2022
67. The claimant was signed off work by his GP for anxiety and depression in consecutive sickness certificates from 7 January 2021 to 11 January 2023.

Parking

68. On 7 April 2020, 5 May 2020 and 2 June 2020, the respondent's staff were informed by the corporate management team by emails that the Town Hall multi -story car park would be free to all staff who park there for April /May / June and no deductions would be made from the April, May or June salary for payment of the staff parking permit and that staff who do not have a permit do not need to pay and display during this period.
69. On 23 June 2020, the respondent decided that the Town Hall car park charges for staff would be reinstated from 1 July 2020. Mr Sheehan informed the claimant of this decision on 23 June 2020 by email and on 26 June 2020 a message relaying this was sent to all staff. This stated that staff had the option of cancelling their parking permits by 3 July to avoid a deduction from their July salary and that 10 daily permits for staff for £25 could be purchased instead. This message was repeated to all staff by email on 24 July 2020 by the Deputy Chief Executive [96]. The claimant confirmed he had received this email.
70. The claimant cancelled his parking permit on 23 June 2020. When a query was raised by a senior wellbeing officer on 29 June 2020, the claimant confirmed that all parking charges would be reinstated on 1 July 2020 and parking would not be free at the Town hall car park.
71. On 4 August 2020 [98] the claimant's email to issues raised by the deputy branch secretary states that he was considering options/ timescales around resuming enforcement within the Town hall car park and that this had not been carried out to date.
72. Page 118 / 119 of the bundle sets out a record of the dates that the claimant parked in the Town Hall car park between 27 August 2020 and 26 October 2020 and whether he displayed a voucher or permit on his windscreen and whether he had a permit. This records that the claimant parked on 14 occasions between 1 September 2020 and 19 October 2020 without displaying a voucher or permit and that he had no valid permit during this period. There are no times during this period, that the claimant paid for his parking.
73. On 26 October 2020, Mr Sheehan and Joe Mottershead met with the claimant and put to him that allegations had been made that he had been failing to pay and display when parking at the Town Hall car park. In response, the claimant explained that he normally pays for parking by paying and displaying a ticket but that he may not have done so on one or two occasions. The meeting was adjourned. The claimant was informed by letter dated 29 October 2020 [127] that he was suspended on full pay whilst an investigation took place. He was informed that the allegations may constitute gross misconduct.
74. The claimant was invited by the respondent to an investigation meeting on 23 November 2020 at the Town Hall to investigate allegations of fraud namely:

- *Obtaining services dishonestly – 14 instances failure to pay & display;*
- *Abuse by position as benefitted from taking the decision not to enforce the MSCP;*
- *Permitting Parking Services staff to park without pay & display.”*

75. The claimant wrote to Joe Mottershead on 20 November 2020 seeking a postponement of the investigatory meeting as he did not feel well enough to undertake another interview and his solicitor had advised him that the separate fraud investigation should be completed first.
76. Joe Mottershead responded on 20 November 2020 with suggestions of how the meeting could still take place with reasonable adjustments and the claimant agreed on 22 November 2020 to respond to questions put to him in writing. Joe Mottershead sent the claimant questions to answer on 27 November 2020 and sought a response by 2 December 2020. This was extended to 16 December 2020 after the claimant provide a letter from his GP dated 2 December 2020. The claimant provided the answers to the questions on 17 December 2020 [162-173] and stated that he was too unwell to attend a meeting in person or via video.
77. In his response to the questions, the claimant accepted that he knew that parking charges in the Town Hall car park resumed on 1 July 2020 and that he forgot on some occasions to pay and display due to his mental health as this affected his concentration and memory and on occasions he was distracted by a colleague. He stated as he had always had a valid parking permit, it is a habit to just park and walk in and failing to pay and display was a mistake and not intentional.
78. A report was prepared by Ms Barnes, investigating officer, dated 16 February 2021 [211-222] in which she concluded that there was a case to answer, and this should be referred to a disciplinary hearing. The claimant was invited to a Disciplinary hearing on 1 March 2021. A transcript of the hearing is at [227-252].
79. At the disciplinary hearing, Ms Barnes accepted that the claimant has a qualifying disability under the Equalities Act as his GP had assessed him as having an underlying medical condition which lasted lasts for more than a year, however she stated that the Council was aware of this until they saw the letter. The Tribunal find that Ms Barnes did not set out the dates the respondent Council accepted that the claimant was disabled or the date of the respondent's knowledge.
80. The claimant was advised on 1 March 2021 that he was to be dismissed for gross misconduct and was then summarily dismissed by letter dated 5 March 2021.
81. The claimant appealed his dismissal and attended an appeal hearing on 12 May 2021. The original decision to dismiss was upheld.

Discussion

82. The Tribunal takes into account the evidence from the claimant and Mr Sheehan, the medical material, the Equality Act Guidance on the definition of disability and submissions. The Equal Treatment Bench Book reminds the Tribunal as to the disadvantages a litigant in person may face in litigation and that litigants in person may make basis errors in the preparation of their cases and may fail to identify salient points in their statement of case.
83. The starting point is that the claimant has the burden of establishing that he met the definition of disability at the relevant times of the unfavourable treatment alleged as a result of disability which was agreed between the parties as (8 June 2020, 1 September – 12

October 2020, 26 October 2020 and 1 March 2021) in accordance with section 6 of the Equality Act 2010. Dealing with each date in turn, I will consider: -

- Did the claimant have a mental impairment namely anxiety and depressive disorder?
- If so did that impairment have a substantial adverse effect on the claimant's ability to carry out normal day to day activities?
- If so, was that effect long term? In particular when did it start; and
- Had it lasted at least 12 months?
- Was the effect likely to last at least 12 months?

June 2010

84. The claimant identified his disability as "mixed anxiety and depressive disorder" which he states he was diagnosed with on 2 June 2010 by his GP.
85. In my Judgement, whilst a diagnosis may have been made by his GP in June 2010 of a "mixed anxiety and depressive disorder", I do not find that the claimant anxiety and depression in June 2010 amounted to a disability for the purposes of the Equality Act 2010. I find that he suffered symptoms of low mood and anxiety which were triggered by breaking up with his partner (a significant life event) and the claimant accepts this. I find that that his symptoms lasted from around February 2010 to the end of July 2010. The claimant has provided no evidence in his impact statement of how his symptoms affected his ability to carry out normal day to day activities in 2010 or on what basis that they could be described as substantial. There is no information of whether he was working during this time.
86. He visited his GP once on 2 June 2010 and did not seek a sickness certificate as he could not work. He was prescribed one set of 28 tablets of medication and his evidence was that he did not take this daily as his doctor prescribed but when he suffered panic attacks. However he has provided no evidence of the time frame, frequency, or duration of these panic attacks and how these affected his day-to-day life. He did not return to his GP when this medication ran out (which would have been by 2 July 2010 if he took these daily) or seek further assistance in managing his symptoms thereafter by use of different medication and / or counselling.
87. The claimant accepted that the next time he saw his GP for issues relating to stress and anxiety was on 30 March 2020, some 10 years later and it was not his evidence that during this period he had any ongoing symptoms that effected his day-to-day activities. For these reasons, I accept the respondent's submission that the claimant's symptoms in June 2010 were a medicalisation of adverse life events which do not amount to a disability as referred to in the case of J -v- DVLA Piper (discussed above).

29 March 2020 - 8 June 2020 / September 2020 – 13 October 2020 / 26 October 2020

88. I find that symptoms of low mood and anxiety were triggered in mid-March 2020 due to the difficult life events that the claimant was undergoing, including the deterioration in his grandfather's health for whom he was a primary carer, the breakup with his partner and work stress. This is what he told Mr Sheehan and his GP on 29 and 30 March 2020 respectively. I find that further life events occurred when the claimant's grandfather sadly passed away on 18 April 2020 and the funeral took place on 6 May 2020. At that time there was also a national lockdown due to Covid 19 which the claimant has described he found distressing and made him feel isolated.
89. The claimant describes in his impact statement that between March 2020 and March 2021 he was a different person unable to cope with minor stresses resulting in panic attacks, was exhausted physically and mentally, had little appetite, struggled to sleep every night, had

no motivation to do anything and would stay in bed until the middle of the day, spent most of the day in his room and did not enjoy things he had previously enjoyed (socialising with friends watching films, reading or playing games online). He could only manage basic household chores as he cared for his elderly grandmother. He became extremely forgetful and unable to focus on even basic tasks like taking medication, walking into a room and forgetting why he had done so, forgetting to wash his hair, and forgetting his keys and re-reading pages of books / emails.

90. Having regard to all the evidence, I am satisfied that from mid-March 2020 until early June 2020 the claimant was suffering from symptoms of depression and anxiety, and these had an adverse effect on the claimant's normal day to day activities. I accept the claimant's evidence that during this time, he had difficulties sleeping, felt overwhelmed, physically found it hard to cope and was crying at times grieving for his grandfather and that the effect on his day-to-day duties was substantial such that he felt unable to resume his work duties. In coming to this conclusion, I take into account that the threshold of what is substantial is low; it is more than minor or trivial and I accept the claimant's evidence that he was struggling to function during this period and that he undertook counselling in May 2020.
91. I then turn my mind to the question of whether those substantial adverse effects on his day-to-day activities were long term. In that regard I conclude that there was a substantial adverse effect on the claimant's normal day to day activities for a period of approximately 3 months only and from 8 June 2020 the claimant's depression and anxiety was no longer having a substantial adverse effect on his to day-to-day activities.
92. I accept that from June to October 2020 the focus should be on what the claimant could not do, or could only do with difficulty, rather than on what he could do (Guidance at paragraph B9), but there is very little contemporaneous evidence or otherwise as to what the claimant could not do during this period. The claimant told his doctor that he felt well enough to commence work duties on 8 June 2020 on a phased return and by 8 July or thereabouts he was working his full-time hours.
93. The claimant's evidence was that his doctor would have signed him off for longer, but he wanted to return to normality, and I find that in doing so he made an assessment as to whether he could practically do the job with his symptoms and he decided that he could. I find that if his symptoms were as described in his impact statement and summarised at paragraph 89 above, he would not have been able to do so.
94. The claimant did not ask Mr Sheehan to extend the phased return to work beyond four weeks in July 2020 as he was not coping, and he did not return to his GP from 3 June to 27 October 2020 relaying any difficulties he was facing or seeking further medication.
95. Further I accept Mr Sheehan's evidence that during this period the claimant did not exhibit any signs to Mr Sheehan that he was struggling to cope at work or demonstrated that he was not able to concentrate at work or carry out difficult tasks. Mr Sheehan also confirmed that he saw the claimant in the office and his assessment was not based solely on telephone calls.
96. The claimant was also not working solely from home during this period and attended the office and was therefore not in bed until midday as suggested in his impact statement and he was in contact with colleagues at work, so he was not completely isolated. When questioned, the claimant did not give any other instances when he forgot to pay for other items or specific details of when he forgot something due to his poor concentration.

97. There is no evidence that he suffered from panic attacks (or the frequency or duration of these) from June to October 2020 and he did not revert to his GP for more medication to help manage these. Overall, I find the claimant's evidence to be vague and to fall short of establishing a substantial adverse effect on the ability to carry out normal day to day activities between June and October 2020.
98. The claimant describes in paragraphs 10 and 11 of his witness statement that he had been prescribed 40 mg of Propranolol since 2020 for symptoms of anxiety, which he describes as heart palpitations and panic attacks and 40 mg of Citalopram for symptoms of depression. Under cross examination the claimant accepted that this was incorrect and misleading and that he received only one prescription of Propranolol of 28 tablets on 30 March 2020 and thereafter received no medication until 27 October 2020 and that he was not having any counselling during this period. I therefore do not need to consider the deduced effects i.e. whether without the medication and counselling the effects would have continued to have been substantial and to a point whereby it could be said that they would be long term.
99. I do not find that the Claimant's depression had recurred in the period from June 2020 leading up to and including the day the claimant was invited to a meeting to discuss that he had not paid for his parking tickets on 26 October 2020. The symptoms have not therefore been of a sufficient length of time to meet the 'long term' aspect of the section 6 definition in that the substantial adverse effects had not lasted 12 months, and I do not find that they can be said at the relevant time to be likely to last 12 months or for the rest of the claimant's life.
100. Whilst I accept that depression and anxiety symptoms can and do recur, I do not consider that it could be said that the effect of the claimant's depression was likely to recur or 'could well happen'. I find that there was no evidence that the 2020 episode of depression and anxiety was part of an underlying condition that was likely to recur beyond the 12-month period and I accept the respondent's submission that the claimant's symptoms during this time were triggered by significant life events and would be a normal response to the breakdown of a relationship in conjunction with a bereavement of a close relative.
101. For the reasons given above, the claimant has not persuaded me that he was a disabled person by reason anxiety and/or depression for the purposes of the Act from 30 March 2020 to 27 October 2020.

1 March 2021

102. The claimant attended his GP on 27 October 2020 after his meeting with Mr Sheehan on 26 October 2020 when he was told that he was being investigated for not paying for parking on 14 occasions and he was suspended whilst the investigation took place. He asked the GP for a letter for his work to set out that he was forgetful due to his anxiety and depression.
103. The claimant was signed off work on 2 November 2020 and remained signed off work until January 2023. He had been prescribed medication to help him sleep (Zopiclone) and for his depression symptoms Propranolol and thereafter 20 mg of Citalopram, however he reported on 16 November 2020 that he had not taken this. On 2 December 2020, the claimant reported 6 kg weight loss and he was then seen by Mid Sussex counselling team on 18 December 2020. He reported things had stabilised when he saw his GP on 29 December 2020 and 8 February 2021.
104. I find that the events of 26 October 2020 were another life event that triggered the claimant's symptoms of depression and anxiety and I accept the respondent's submission that the claimant's anxiety and depression symptoms reported to his GP on 27 October 2020 are directly linked to his issues at work and this is reflected in the GP clinical notes and the fact

that the claimant went to see his GP obtain letters for his work. I find that the claimant's initial symptoms from 27 October 2020 would be a normal response to being suspended from work and investigated for fraud with a real possibility of being dismissed. I find that the claimant reported his condition was stable at the end of December and February 2021 as by this time he had given his evidence for the investigation and was awaiting the outcome.

105. The claimant was subsequently dismissed on 1 March 2021. The respondent accepts by 1 March 2021 the claimant had a mental impairment by reason of his depression and anxiety and this had an adverse impact on his ability to carry out day to day activities and this effect was substantial. However the respondent denies that effect was long term as although they accept that his impairment was ongoing as of 9 January 2023, they submit that had the claimant not been dismissed, it is likely that the substantial effects on his day-to-day life would have likely ceased as his symptoms were directly linked to work issues and then his dismissal. The substantial adverse effects of the anxiety and depression would not then have lasted for 12 months.
106. Taking all the circumstances of the case into account, including what the claimant could reasonably be expected to do to prevent any reoccurrence, I accept this submission.
107. Neither party have provided me with medical evidence to assist on whether the substantial effects on the claimant's day to day activities are likely to recur beyond 12 months after the first occurrence. Having found that the claimant's symptoms are directly linked to being investigated for fraud at work and then his dismissal, I find that the substantial adverse effects of the claimant's anxiety and depression were not likely to recur beyond 12 months. In doing so, I have disregarded events taking place after 1 March 2021. As such, on the balance of probabilities, at the time of the claimant's dismissal being 1 March 2021, it was not likely that his impairment and the subsequent substantial effects on his day-to-day activities were likely to recur beyond 12 months or to last for 12 months, nor had they at that stage lasted for 12 months.
108. I am satisfied that the Claimant did not have a mental impairment which met the definition of disability on 1 March 2021 and that he was not a disabled person for the purposes of the Equality Act 2010.
109. Accordingly, the claims against the respondent for discrimination arising from disability and failure to make reasonable adjustments are struck out.

Regulation 4 – excluded condition.

110. The respondent also avers that the claimant's disability amounted to a tendency to steal, in that the claimant failed to pay for parking on 14 occasions between September and October 2020 in the respondent's car park and the claimant's mental impairment and subsequent effect, being the claimant's forgetfulness and inability to concentrate, constitutes an excluded condition for the purposes of The Equality Act 2010 (Disability) Regulations 2010/2128 Regulation 4(1)(b).
111. Based on my findings above, I do not need to decide on this issue. I do however make the following observations. The respondent did not raise this defence in their ET1, but this was included in the skeleton argument and the claimant and Tribunal were provided with this the evening before the preliminary hearing. I agreed to hear submissions on this point and review the evidence to ascertain whether I could decide this issue. The respondent referred me to the case of *Wood v Durham County Council: UKEAT/0099/18/OO* and that to determine whether or not the Claimant had a tendency to steal, the Tribunal must apply the test for dishonesty set out in *Ivey -v- Genting Casinos (UK) Ltd (t/a Crockfords) [2017] UKSC 67 (25 October 2017)*.

112. I find that I did not have all the evidence before me, including documents relating to the separate fraud investigation carried out and a detailed witness statement from the claimant, to make such a finding on dishonesty. The claimant was not legally represented and as recognised by the ETBB litigants in person do face disadvantages in a litigious process. The claimant had not been put on notice of the respondent's defence with sufficient notice before the hearing. Further this was a preliminary hearing only listed for one day and the final hearing is due to take place on the issue of unfair dismissal where after hearing all the evidence the claimant's culpability will form part of the issues for the Tribunal to resolve. I note the helpful summary from Her Honour Judge Stacey in the Wood case which I find applies here,

"In this case there was no knockout point since the unfair dismissal complaint remains to be determined and there is overlap in the issues before the Preliminary Hearing and the unfair dismissal claim, which would have been better dealt with together. The anticipated saving of one day of Tribunal hearing was also illusory. In future, it would be advisable for Tribunals to think extremely carefully before listing as a Preliminary Hearing matters involving Regulation 4 where there is also a free-standing wrongful or unfair dismissal complaint unless the issues are genuinely discrete."

Employment Judge Sekhon

Date: 18 May 2023